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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. .....

[redacted]

Petitioner,

v.

[redacted]

Respondent.

PETITION FOR WRIT OF CERTIORARI

Comes your petitioner, Ekalo Thurman, by way of counsel, who would most respectfully pray that a writ of certiorari issue to review that judgment of the Criminal Court of Appeals of Tennessee entered therein on the 12th day of November, 1969 and becoming final on the 6th day of July, 1970 upon the denial of a petition to rehear a previously denied petition for certiorari by the Tennessee Supreme Court.

OPINION BELOW

The opinion of the Tennessee Court of Criminal Appeals is as yet unreported in the official reports, but is reported at 455 S.W. 2d 177.

JURISDICTION

This appeal is taken pursuant to 28 U.S. Code Sec. 1257 (3).

The petitioner, Hubie Thurman, was tried before the Criminal Court, Second Division, in and for Hamilton County, Tennessee on the 21st day of March, 1969. From that trial and sentence an appeal was properly and timely perfected with the decision there likewise being adverse to the petitioner. That decision was entered on November 12, 1969.

A petition for certiorari was denied by the Tennessee Supreme Court on May 19, 1970 and a petition to rehear was likewise denied on the 6th day of July, 1970.

An order extending time for the filing of a petition for a writ of certiorari in this cause was signed by the Honorable Mr. Justice Stewart on October 5, 1970. That order allowed to and included December 4, 1970 for said filing.

QUESTIONS PRESENTED

1. Whether or not, in light of the particular circumstances existent at the time of said petitioner's arrest, there existed sufficient probable cause to enable the state officer, so acting, to make a warrantless arrest.

2. Whether or not the trial court erred in failing to sustain the petitioner's motion to suppress the evidence removed from his automobile for the reason that the search of the petitioner's automobile and his subsequent warrantless arrest was illegal and unlawful and in violation of his 4th Amendment rights.

3. Whether or not there must be underlying or other corroborative circumstances in addition to only a supposedly reliable informant's accusation to justify a warrantless arrest.

4. Whether or not the trial court erred in holding that evidence discovered during a search will justify a warrantless arrest and search.

5. Whether or not the trial court erred in holding that evidence discovered during a search will sufficiently corroborate an informant's accusation so as to make him a reliable informant.

6. Whether or not the trial court erred in denying a defense attorney the right to cross examine the arresting officers as to any instances and/or circumstances relied upon by them to show an informant's reliability.

7. Whether a trial court may determine an informant's reliability solely at an ex parte in camera proceeding.

8. Whether or not the trial court and the Court of Criminal Appeals' ruling under authority of existing state case law, that a person even though illegally seized can "voluntary consent" cleanse the fruits of that seizure so as to make those fruits admissible evidence against him sufficient to sustain his conviction is a state action repugnant to the Constitution of the United States in that such behavior is prohibited by the 4th Amendment to the state either by incorporation into, or because of, the 14th Amendment.

CONSTITUTIONAL AMENDMENTS INVOLVED
UNITED STATES CONSTITUTION.

FOURTH AMENDMENT: The right of the people to be secure in their person, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath, or affirmation, and particularly describing the places to be searched, and the persons or things to be seized.

FOURTEENTH AMENDMENT: Section 1.: All persons born and naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall abridge the privileges or immunities of citizens of the United States nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

At approximately 7:00 P.M. on the evening of the 28th of October, 1968, Chattanooga, Tennessee police officers received information that a white male, driving a 1958 blue Chevrolet would be in the 200 block of Lookout Street at approximately 7:00 A.M. on the morning of the 29th of October, 1968 and that there would be around 10 to 30 gallons of unstamped whiskey in the automobile. (Trial Bill of Exceptions, page 7)

At 6:50 A.M. on the morning of the 29th of October, 1968, the petitioner was seen in the 200 block of Lookout Street driving a 1958 blue Chevrolet. There were two stakeout teams on the scene at the time, two city detectives were in one automobile and a State Alcohol Beverage Control Officer was in another. (Trial Bill of Exceptions, page 3)

The petitioner was stopped and advised by his antagonists that they were police officers who had information that he was hauling whiskey. The petitioner stated in reply to questioning that he did not have a key to the trunk. After a search of his person he was told by the officers that they would obtain a warrant to which he replied, "Well you've got me," and gave them the trunk key. (Trial Bill of Exceptions, page 4)

Upon subsequent search, the trunk was found to contain seventeen gallons of a liquid purported to be non tax paid liquor. (Trial Bill of Exceptions, page 29)

The petitioner was then placed under arrest (Police Court Bill of Exceptions, page 6, Trial Bill of Exceptions, page 17)

At the trial, upon an attempt to introduce evidence of the findings of said officers an objection was made and overruled. That offering was objected to on the grounds of a 4th Amendment violation.

Upon examination of one of the police officers, out of the presence of the jury, defense counsel was told that the officer had acted upon the simple statement of an informant that such would be the facts. They had no other knowledge and they had no basis at all to know that the informant actually knew whether there was any quantity of whiskey in the car. (Trial Bill of Exceptions, page 24)

The petitioner, upon being convicted, filed a motion for a new trial mainly directed at an improper seizure and search. It was denied and an appeal in the nature of error was properly perfected on the same issues with the reply brief for the state likewise being directed toward the sufficiency of probable cause for the arrest and search.

The trial court subsequently filed a memorandum opinion basing its allowance of the introduction of said evidence, and the overruling of the motion for a new trial, on a consent search.

This issue was neither argued or mentioned by either the petitioner or the

State in the Court of Criminal Appeals' oral argument; but, the Court of Criminal Appeals handed down its opinion likewise being based on a consentual search therein not finding it necessary to consider any questions pertaining to the sufficiency of probable cause for the seizure and search of the petitioner's vehicle.

Certiorari and a subsequent petition to rehear were denied.

ARGUMENT

The Courts below have decided federal questions of substance in a way probably not in accord with applicable decisions of this Court.

There exists within this case primarily four questions of importance.

One deals with whether or not the police must obtain a warrant prior to an arrest where such is practicable. This question was answered in the affirmative in Terry vs. Ohio, 392 U.S. 1.

Such was not done here where police officers stated they did not have sufficient probable cause to justify the issuance of a warrant, yet over twelve hours later, apprehended the petitioner without a warrant.

The second question, being of primary importance, is whether there existed sufficient probable cause to enable the police to make a warrantless arrest.

It is axiomatic that probable cause must be made before a person's liberty may be restricted, and facts ascertained by a subsequent search cannot validate an arrest. Carrol vs. U. S., 267 U.S. 132; Henry vs. U. S., 361 U.S. 98; Rios vs. U. S., 364 U.S. 253.

This Court has continually held that mere suspicion is not enough to warrant an arrest, yet that is exactly what was done in this case.

Reflecting on both these questions, we are told that warrantless searches are presumptively unreasonable. See vs. Seattle, 387, U.S. 541. Katz vs. U.S., 389 U.S. 347. This doctrine was applied to personal seizure as well in the cases of Terry vs. Ohio, 392 U.S. 1 and Chimel vs. California, 395 U.S. 752. These holdings indicate that the police must, wherever practicable, obtain advance judicial approval of an arrest with the failure to comply with this requirement being excused only by exigent circumstances. It is therefore apparent the prosecution must show to justify any admission into evidence of fruits of a warrantless arrest that there existed exigent circumstances and specific and articulate facts which combined with the reasonable inferences therefrom would allow a reasonably prudent man to believe that a crime had been or was being committed.

It is the contention of the petitioner that such was clearly not done in this cause.

While this case contains certain factual similarities to Herreres vs. U. S., 5CrL 2265, in which this Court denied certiorari last term, it is the contention of the petitioner that such ruling is not controlling.

In the Herreres case an informant gave extremely accurate and detailed information of a marijuana smuggling scheme which was to take place four days hence. That information was detailed even down to the license number

of the automobile. The automobile's activities were further observed for two days of corroborative use. This was the turning factor with the Ninth Circuit Court of Appeals.

At the subsequent motion to suppress evidentiary hearing, the Court found the informant's reliability was proven by revelations of several prior instances in which his information had proven correct.

Herreres was denied only access to the informant's name and that was his appeal question.

While there were no underlying circumstances detailed to the officer such as would have allowed his obtaining of a warrant under the holding of Spinelli vs. U. S. 393 U.S. 410 and Aquilar vs. Texas 378 U.S. 108, there was no question of the informant's reliability.

The Court did not view that case as one where a police officer acted solely upon an informant's tip, but instead viewed it as a case in which an officer's suspicions of criminal activity in reliance upon his proven reliable informer were elevated to the status of sufficient probable cause necessary to justify an arrest by subsequent suspicious activity observance.

This is clearly not the case at hand. The arresting officers here continually told of the lack of any underlying circumstances, the lack of

sufficient detail in their information, and their lack of reasonable belief in there being sufficient probable cause.

There was missing here the detailed information of the informant as well as the extended corroborative behavior observance present in Herreres.

The officers, time after time again, stated they did not arrest the petitioner until after they had searched his automobile.

Had they actually reasonably believed in the reliability of their informant's information, had they been possessed of a detailed depth of information and an extended period corroborative observation, they would have immediately placed the petitioner under arrest; yet all they wanted was to look in his trunk. They obviously felt a lack of probable cause for his arrest until after they had looked in the trunk and there justified their thereafter claimed reliance.

For a third question, the defense counsel was denied the right to determine any incidents of reliability on the informant's part, not just his name as was the case in Herreres.

Lastly, the petitioner would contend that the trail Court and the appellate court's attempt to bypass all Fourth Amendment search and seizure questions by deeming this a consentual

search was but a blatant attempt to bypass this Court's long-standing, well-stated case law.

It is the contention of the petitioner that incidents of a warrantless arrest, where the basis for that arrest are defective are just as much within this Court's pronouncement in Bumper vs. North Carolina, 391 U.S. 543, as those of a warranted arrest.

This line of thinking regarding a consentual search would raise many important and not heretofore considered questions for consideration by this Court; such as, the extent of knowledgeableness required for waiver of one's Fourth Amendment right, the burden of proof as to the voluntariness of that waiver, and, whether the necessary burden of proof would require Miranda type warnings.

Needless to say, it is the suggestion of the petitioner that the ruling of this Court in Bumper would full well apply to the appellate court treatment of this case.

This particular question has been faced by the Court of Appeals of New Mexico in State vs. Lewis, 454 P 2d 360 (1969) wherein the decision was that the Bumper "acquiescence to a claim of lawful authority" doctrine was applicable.

CONCLUSION

The issue of this case, the petitioner contends, is clearly whether a state may ignore the import of the decisional law of this Court by judicial slight of hand. This case involves mere suspicion detainment with a search producing contraband resulting in arrest, trial, and conviction with appellate review denial based upon the phrase "Well, I guess you've got me," which was taken as a consent to search and a confession of guilt. It could have been no more a denial of fairness had the appellate court taken the petitioner's statement as having been a plea of guilty, thereby holding him to have waived all right of appeal.

The arrest, the indictment, prosecution, conviction and sentencing subsequent thereto are all but the fruit of an unlawful search.

The lower court's decision is merely a denial of there being any validity in the exclusionary doctrine.

For these reasons heretofore stated, the petitioner contends this Court should summarily reverse the decision of the Court below.

Summary reversal is appropriate in this case and consistent with this Court's practice in cases not only where the law

is settled by prior decision but also where the action of the lower court was clearly improper.

Respectfully submitted,

Clarence E. Walker
Jack R. Brown
Jesse O. Parr
424 Pioneer Building
Chattanooga, Tennessee

APPENDIX A

IN THE CRIMINAL COURT OF HAMILTON COUNTY, TENNESSEE - DIVISION II

Court met pursuant to adjournment, present and presiding the Honorable Tillman Grant, Judge, etc., when the following proceedings were had, to-wit:

116028 STATE VS. HASKLE THURMAN
FELONIOUSLY TRANSPORTING WHISKEY

O R D E R

The defendant in the above styled case was tried before a jury for the offense of Feloniously Transporting Whiskey and was found guilty and punishment was fixed at two (2) years in the penitentiary. Defendant's attorney, Mr. Jack Brown was allowed time in which to file a motion for a new trial. The motion was seasonably filed and the court heard arguments on the motion on behalf of the defendant and on behalf of the State of Tennessee. This motion was taken under advisement and is now before the Court.

In the motion and amended motion for a new trial the defendant contends that the Court erred in failing to sustain the defendant's motion to suppress the evidence for reason of the arrest and search of the defendant's automobile was illegal and unlawful and in violation of the defendant's rights under the Constitution of the State of Tennessee and the 4th Amendment of the Constitution of the United States of America.

The motions contained other grounds which more or less pertain to the legality

of the search and arrest of the defendant. The Court will not discuss any other phases of the motion except those pertaining to the arrest and search of the defendant.

The testimony of the arresting officer was that on the night before the arrest of the defendant he had received information from a person whom he had known previously over a period of about two and one-half years and that the person was reliable, in view of the fact that he had received information on many occasions from the informant which was always reliable, was that approximately 7:00 A.M. the next morning a 1958 blue Chevrolet would be in the 200 block of Lookout Street. The car would be driven by a white male who usually wore overalls, dressed in overalls and there would be around 10 to 30 gallons of unstamped whiskey in the automobile. This information was received between 7 & 8 P.M. on the night before the arrest, at the time that the officer talked to the informant in person.

The officer testified that on October 29, 1968 at about 6:50 A.M. Detective Elsea and Ken Malone, and Agt. Sampley, with the State Alcohol Beverage Control Commission, parked in the vicinity and saw the defendant in a 1958 blue Chevrolet stop in the 200 block of Lookout Street.

The testimony of Detective Malone was that he walked up to the defendant's parked car, advised him that he

was a police officer and that he had information that he (the defendant) was hauling whiskey and asked him if he would mind opening the trunk of his car. He said, I don't have a key to the trunk and the Detective suggested that we can obtain a warrant, but the defendant said "well you've got me" and reached down on the floor board and got the trunk key and got out of the car and opened the trunk. Further testimony was that there was 17 gallons of unstamped whiskey in the trunk.

"In the case of Herrington v. State of Tennessee, Supreme Court of Tennessee April 27, 1956 - two patrolmen had information that a defendant was engaged in the illicit business of hauling whiskey. One of the patrolmen had climbed upon a hillside where he had a view of the defendant's green Ford and saw defendant's Ford being loaded with pasteboard cartons of liquor, judging from the size, shape and color, although he was not able to identify them as such at this particular distance. The patrolman followed the defendant when he left in the green Ford, stopped him and asked for his driver's license. Defendant stepped out of his car and handed his driver's license to the officer. After they had examined it and found it in order they stated to him that they believed he had whiskey in his car. One of the patrolmen, who had possession of the driver's license started over to the patrol car with the intention of calling over the police radio for a search warrant, whereupon the defendant told the other officer that

there was no need for a search warrant, that he did have whiskey in the car. Defendant then opened the trunk of his car and there the officers saw a large quantity of whiskey, some 88 half pints and 12 fifths.

This case held that there was no search involved but the evidence was given voluntarily. (see case of Asklen v. State 196 Tenn. at page 325, 267 S.W. 2d 101).

That is the same situation in the case at bar when the defendant Haskle Thurman said "well, you've got me" and reached into the floor board and got the trunk key and got out of the car and opened the trunk.

In view of the decisions of the Supreme Court of Tennessee in the cases of Herrington v. State 291 S.W. 2d 587 and the Acklen v. State 267 S.W. 2d 101, it is the opinion of this court that there was no search of defendant's car he gave the evidence voluntarily to the officers, therefore, the arrest was legal.

It is, therefore, ORDERED, ADJUDGED AND DECREED, that the motion for a new trial be overruled and the defendant be allowed to note his exceptions and also allowed 90 days in which to perfect an appeal to the Criminal Court of Appeals of the State of Tennessee. Appeal bond is set at $1,000.00

This the 15th day of July, 1969.

(S) TILLMAN GRANT
Tillman Grant, Judge

APPENDIX B

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

KNOXVILLE

DECEMBER 1969

APPEAL IN ERROR FROM THE CRIMINAL COURT OF

HAMILTON COUNTY, DIVISION II

HONORABLE TILLMAN GRANT, JUDGE

HASKLE THURMAN

Plaintiff in Error

VS. NO. 166

STATE OF TENNESSEE

Defendant in Error

For the Plaintiff in Error:

Jack R. Brown
Chattanooga, Tennessee

For the Defendant in Error:

David M. Pack
Attorney General
Nashville, Tennessee

Thomas E. Fox
Deputy Attorney General
Nashville, Tennessee

Edward E. Davis
District Attorney General
Chattanooga, Tennessee

John R. Seymour
Assistant District Attorney General
Chattanooga, Tennessee

JUDGMENT MODIFIED AND AFFIRMED

OPINION BY JUDGE ORIS D. HYDER

FILED: _____

O P I N I O N

This is an appeal in the nature of a writ of error from a conviction of transporting more than one gallon of unstamped whiskey and a resulting sentence of two years in the penitentiary.

Haskle Thurman was arrested on the morning of October 29, 1968, by two Chattanooga City Detectives and an Agent of the State Alcohol Beverage Control Commission. The detectives approached the defendant when he was in a blue, 1968 Chevrolet automobile, identified themselves, advised him that they had information that he was hauling whiskey, and asked him if he would mind opening the trunk of the car. First, the defendant told them that he did not have a key for the trunk, and Officer Elsea told him: "we can obtain a warrant." According to the testimony of Detective Elsea, the defendant then said, "well, you've got me and reached into the floorboard and got the trunk key and got out of the car and opened the trunk." The trunk contained seventeen gallons of unstamped liquor or whiskey.

Detective Elsea testified, in the absence of the jury, that the night before this arrest he had received the following information:

"His information was that at approximately 7:00 A.M. the next morning that a 1958 blue Chevrolet would be in the two hundred block of Lookout Street. The car would be driven by a white male

who usually wore overalls, dressed in overalls, and there would be around ten to thirty gallons of unstamped whiskey in the automobile."

He testified that he had known this informer for approximately two and a half years, that he had received information from him on many occasions, and that the information had always been reliable.

On cross examination counsel for the defendant asked Officer Elsea why he did not obtain a search warrant, and the officer replied: "The informant was not sure on the license number of the car so I couldn't obtain a search warrant." Counsel also inquired if the officer had asked the informer how he knew the whiskey would be in the car, and if he had asked the informer if he had seen whiskey in this car. Officer Elsea stated that he had not asked the informer these questions. He also asked Detective Elsea if he had any information that would have precluded him from stopping any white male driver in a '58 blue Chevrolet; and the officer responded: "No, sir."

The officers saw the defendant at six fifty o'clock, A.M., as he drove past them and stopped the car in the two hundred block of Lookout Street, in Chattanooga. The record does not disclose how the defendant was dressed or that he was wearing overalls, nor does the record show that he was a white man.

Counsel for the defendant attempted to obtain the name of the informer, but the trial judge sustained the State's objections to his questions on this subject.

The record discloses that the trial judge had a discussion with Officer Elsea, which is reported as follows:

"THE COURT: In the trunk of this car. Now, Mr. Brown has raised the question of whether or not this information you received was -- came from a reliable and dependable person. Now off the record -- (Thereupon a discussion was had between the Court and witness out of hearing of court reporter and counsel.)"

And the trial judge ruled:

"Well let the record show that the Court has questioned the witness to determine in the Court's own mind whether or not this informant was a reliable and dependable person and whether his information came from a reliable and dependable source. Based on Wallace vs. State, 417 S.W. 2d 781, under a United States Supreme Court decision cited therein this Court is overruling your motions, Mr. Brown."

The first assignment of error contends that the verdict of the jury is contrary to the law and the evidence in the cause. The other five assignments of error complain that the trial court erred in failing to sustain the defendant's motion to suppress the evidence for the reason that the search

of the defendant's car, and the arrest of the defendant, violated his legal and constitutional rights. It is also contended that the trial court erred in limiting defendant's counsel in cross examining the officer relating to the underlying circumstances of the informant's reliability and the credibility of the informant's alleged information; and the procedure followed by the trial judge in "going off" the record for the purpose of determining reliability of the informant and the credibility of the information is assigned as error. It is contended that the trial judge thus deprived the defendant of his right to cross examination and confrontation by this off the record procedure.

The State insists in its brief that the search of the car was reasonable and the evidence seized was admissible. The State bases this position on the theory that the information received by the officer was sufficient to justify the search.

We do not believe that it is necessary to consider the question of the sufficiency of the information received by the officer to establish the probable cause required in our law to authorize the search of the car without a warrant, because we find that the record is clear that the defendant, without coercion, permitted the officers to see in the trunk of the car without a warrant. He admitted to them that "well, you've got me."

In Frix vs. State, 148 Tenn. 478, 256 S.W. 449, three officers went to the defendant's house, and, before making their presence known, saw through an open door of an outhouse at the rear of the residence some barrels of "beer." The officers then knocked and when the defendant appeared they placed him under arrest. It was then shown, without contradiction, that one officer asked the defendant whether they would be required to go back to town and obtain a search warrant in order to search his premises, or whether he would be willing for them to search his premises without such a warrant. To this inquiry the defendant Frix replied: "Mr. Brown, you are welcome to go anywhere on my place you want to and search. Go to it." In sustaining the conviction of the defendant for unlawfully manufacturing whiskey, or attempting to manufacture whiskey, and in sustaining the search as having been done with the consent of the defendant, our Supreme Court said:

"Here, instead of announcing their intention to search whether permission was given or not, the officers informed defendant that unless permission was given they would be compelled to go back to town and procure a search warrant. There was no coercion about the defendant's subsequent agreement and consent that the search be made without a warrant. He therefore waived his right to require that the officers obtain a search warrant before searching the premises."

Our Supreme Court has ruled consistently that a defendant may waive his rights relative to searches and seizures under the Constitutions of Tennessee and the United States; and that for such a search without a warrant to be valid the entry must be without coercion. Byrd vs. State, 161 Tenn. 306, 30 S.W. 2d 273; Simmons vs. State, 210 Tenn. 443, 360 S.W. 2d 10; Shafer vs. State, 214 Tenn. 416, 381 S.W. 2d 254; Fox vs. State, 214 Tenn. 694, 383 S.W. 2d 25; Deerfield vs. State, 220 Tenn. 546, 420 S.W. 2d 649.

The decisions of the United States Courts are in accord. In an opinion in the United States District Court for the Middle District of Tennessee, Simmons vs. Bomar, 230 F. Supp. 226, at 229, we find:

"There is no question that one's constitutional right to demand a search warrant can be waived of that one can consent to a search without a warrant. United States vs. Jones, 204 F. 2d 745 (7th Cir. 1953), cert, denied, 346 U.S. 854, 74 S. Ct. 67, 98 L. Ed. 368. However this is not presumed, and the burden is upon the state to show that a competent and voluntary waiver has been made. Mere acquiescense or consent in the face of an announced or apparent intention to search with or without a warrant or permission does not constitute a waiver. See Amos vs. United States, 255 U.S. 313, 41 S. Ct. 266, 65 L.Ed. 654 (19210; Catalanotte vs. United States, 208 F. 2d 264 (6th Cir. 1953); Judd vs. United States, 89 U.S. App. D.C. 64, 190 F. 2d 649 (1951); United States vs. Evans, supra.

"However, where, as here, the consent is given in response to an announced intention to leave and secure a warrant if permission is not given, the waiver is competent and voluntary. Gatterdam, et al., vs. United States, 5 F. 2d 673 (6th Cir. 1925); United States vs. Page, 302 F. 2d 81 (9th Cir. 1962); Grice vs. United States, 146 F. 2d 849 (4th Cir. 1945); United States vs. Haas, 106 F. Supp. 295 (W.D. Pa. 1952); Frix vs. State, 148 Tenn. 478, 256 S.W. 449 (1923)."

This proposition is well stated in 79 C.J.S. Searches and Seizures, Sec. 62 (b), where we find:

"In order to constitute a waiver it must be clearly shown that consent given to an otherwise illegal search was voluntary, that is, that it was free from coercion, duress, or fraud, and not given merely to avoid resistance. Voluntary consent requires sufficient intelligence to appreciate the act as well as the consequence of the act agreed to. Since the constitutional guaranty is not dependant on any affirmative act of the citizen, the courts do not place the citizen in the position of either contesting an officer's authority by force or waiving his constitutional rights, but instead they hold that a peaceful submission to a search or seizure is not a consent or an invitation, thereto, but is merely a demonstration of regard for the supremacy of the law. It is not a waiver of objection to the illegal search, or a waiver of a valid warrant, or a waiver of the constitutional guaranty. However, a submission to search in response to a threat

of the officers that they will procure a search warrant does not make it any the less voluntary, and the mere fact that a search and seizure is made at the instance of an officer or that accused knew the searcher to be an officer does not establish that the consent was involuntary. The party alleging the waiver must establish that the waiver was a free and voluntary act."

The only proof in the instant case on the subject of whether or not the defendant, without coercion, duress, or fraud, voluntarily waived his rights relative to searches and seizures under the Constitutions of the United States and Tennessee, was the testimony of Detective Officer Elsea. He testified:

"I walked up to the defendant's car, advised him who I was, I was a police officer, that we had information that he was hauling whiskey and asked him if he would mind opening the trunk of the car. He said I don't have a key to the trunk and I said, well, we can obtain a warrant. He said, well' you've got me and reached into the floorboard and got the trunk key and got out of the car and opened the trunk."

This testimony was in no way disputed, even though a lengthy hearing was held in the absence of the jury and the defendant had opportunity to testify on that limited question. Certainly the State, having the burden of establishing that the waiver was free and voluntary, has borne that burden in the light of the cases we have cited. We find that

the facts justifying our conclusion that the waiver was free and voluntary are even stronger than those established in Frix vs. State, supra, because here we have more than the statement of the defendant consenting to the search; here, the defendant actually opened the trunk for the officers.

The State, in its reply brief, relies upon the recent opinion of the Tennessee Supreme Court in State vs. William A. Tolden, filed December 15, 1969, which will be published. We concede that the facts in that case are quite similar to the facts inthe instant case, but there the record does not show that the defendant consented to the search. The holding of our Supreme Court in Tolden would, of itself, perhaps support the conviction in this case, but there are some differences in the circumstances in the two cases.

In view of our holding that this search and seizure was with the consent of the defendant it follows that the evidence seized was admissible in the trial. There being no other evidence in the case it follows that the jury was certainly justified in their verdict of guilty. The defendant has not borne the burden which is his of showing that the evidence preponderates against the verdict of guilty and in favor of his innocence. McBee vs. State, 213 Tenn. 15, 372 S.W. 2d 173; Brown vs. State, Tenn. Crim. App., 441 S.W. 2d 485.

The unstamped whiskey or liquor seized from the defendant's car was poured out, except one pint which was retained and admitted into evidence at the trial. It can not be contended successfully that, under the best evidence rule, it was incumbent upon the State to produce the liquor itself in court, though quite an argument was made during the trial on this point. Whiskey of the kind seized by the officers is a familar article and its identity can be determined by sight, aided either by the sense of smell or by the sense of taste. The best evidence rule is not applicable to things of this nature and the production of such things in court is not required. Williams vs. State, 179 Tenn. 247, 165 S.W. 2d 377.

The assignments of error contending that the trial court erred in failing to sustain defendant's motion to suppress the evidence, that the trial court erred in limiting defendant's counsel cross examining the officer relating to the informer and the credibility of the alleged information, and the assertion that the trial judge erred in "going off" the record for the purpose of determining reliability of the informant are all overruled. None of these contentions have any merit in view of our holding that the search and seizure were with the consent of the defendant.

The defendant was convicted of transporting more than one gallon of intoxicating liquors, and his maximum punishment was fixed by the jury at two years in the penitentiary. In

imposing sentence the trial judge ordered that the defendant be confined in the penitentiary for a term of not less than two years nor more than two years. This was error, as is pointed out in the State's reply brief. The minimum sentence for this offense is one year and one day in the penitentiary. TCA Sec. 39-2509. Accordingly, we modify the judgment in this case to be a term of one year and one day to two years in the penitentiary and the costs. Leek vs. State, 216 Tenn. 337, 392 S.W. 2d 456.

As modified, we affirm the judgment of the trial court.

(S) ORIS D. HYDER
Oris D. Hyder, Judge

Concur:

(S) ROBERT K. DWYER
Robert K. Dwyer, Judge

(S) MARK A. WALKER
Mark A. Walker,
Presiding Judge

APPENDIX C

POLICE COURT

CHATTANOOGA, TENNESSEE

OCTOBER 31, 1968

STATE OF TENNESSEE

VS.

HASKLE THURMAN

THE COURT: Is that the way to spell your name?

A H-a-s-k-l-e (spelling).

THE COURT: Haskle Thurman is charged with transporting whiskey.
Everybody that is going to testify stand up and raise your right hand.
(Thereupon witnesses were sworn.)

OFFICER MALONE

THE COURT: Go ahead and tell what happened.

A Judge, Your Honor, on the 29th of October, approximately 6:50 A.M., we had information that a 1958 blue Chevrolet, white male driving would be in the 200 block of Lookout, between 10 and 20 gallons of unstamped whiskey in the car. At 6:50 A.M. we saw a car drive up in the 200 block of Lookout, he pulled over, and we pulled out behind him and checked the car and found 17 gallons in the car.

MR. HERRELL: Where was the whiskey in the car?

A. Trunk.

MR. HERRELL: What did you say to him?

A We told him we were police officers, we had information that there was whiskey in the car.

Q What did he say?

A I don't remember exactly what he said.

Q What did you do?

A Well we talked about it a few minutes. He said well, I guess you've got me, there is some in there.

Q And that was the information you had?

A There would be between 10 and 20 gallons of unstamped whiskey in a 1958 blue Chevrolet.

Q '58 Blue Chevrolet, did they tell you where and when?

A They said the 200 block of Lookout Street, around 7:00 o'clock in the morning.

MR. BROWN: What time did you receive this information?

A The night before.

Q The night before?

A Yes.

Q How long had you known this informant?

A I have known him, I guess a couple of years.

Q Has he ever given you any information other than this case?

A Yes.

Q How many other cases has he given you?

A I don't remember. He has given me information before.

Q Will you tell us the cases he has given you before?

MR. HERRELL: I object.

THE COURT: He said he did not know.

MR. BROWN: He hasn't answered the question.

THE COURT: He told you before.

MR. BROWN: I asked him to give the cases where he had given reliable information on before.

A I don't remember.

Q You had known him two years?

A Yes.

Q And you say he has given you information, you made the arrest, and with the exception of this case, you do not remember any case in the past two years he has given you information on?

A I don't remember right off-hand, no sir.

Q Could you get that information?

A Yes.

Q Do you have a source, record?

A Yes.

Q And you can furnish it at a later time?

A Yes.

Q And you will furnish it in court, the record?

A If I have to furnish it, I can, yes.

MR. HERRELL: Let me ask you this. If you reveal the names of the cases your informant gave you on previous cases, would they lead to the person's identity?

A It could, yes.

MR. HERRELL: On that basis we object again.

MR. BROWN: Your informant has a criminal record?

A I don't know.

Q When he gave you the information, did you check his record?

A No sir, I didn't.

Q What kind of business is he in?

MR. HERRELL: Objection.

THE COURT: You do not have to answer that.

MR. BROWN: What information did he give you?

A He gave Detective Elsea and myself, a 1958 blue Chevrolet would be in the 200 block of Lookout Street around 7:00 o'clock the next morning and would have between 10 and 20 gallons of unstamped whiskey on the car. We did not have the license number of the car, that is the reason we did not obtain a search warrant. We did not know the name of the boy driving the car, we had white male.

A Blue Chevrolet?

A 1958.

Q 1958 blue Chevrolet?

A Yes.

Q Light colored blue?

A He just said blue.

Q Blue Chevrolet?

A Yes.

Q Did he tell you what state and license number?

A No sir I did not have the license number.

Q Did he tell you it was Tennessee or Georgia, or anything other than the state?

A He did not know.

Q Did he give you any other identification of the automobile other than the fact that it was a 1958 blue Chevrolet?

A White male driver.

Q And did he give you any description of the driver other than the fact that he was white, and male?

A No sir.

Q Now you of course told him you had information he had whiskey, and you took his keys away from him and searched the automobile, is that right?

A No sir, I did not take his keys. He had the key, and his switch key was in his hand, and it did not fit, and he said he did not have a key to that one. We kept tinkering and he said well, there is some in there, and he gave us the key to the trunk.

Q And that is all he said?

A That is all I remember.

Q And you said nothing else to him, and he said nothing else to you?

A Well, we advised him of his rights after we placed him under arrest.

Q But you had already gotten the whiskey before you placed him under arrest?

A We did not place him under arrest at the scene.

Q How long after you got the whiskey until you placed him under arrest?

A As soon as we saw the whiskey.

Q You opened the trunk and saw the whiskey before you put him under arrest?

A Yes.

THE COURT: Is that all?

MR. BROWN: That's all I have of this witness.

THE COURT: Are you going to put him on?

MR. BROWN: No.

THE COURT: Let him make a $1,000.00 bond.